

NO. 46926-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

URIEL L. GARCIA,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court exceeded its authority when it imposed restitution for a charge dismissed pursuant to a plea bargain because the defendant did not explicitly agree to pay restitution on that offense.

Issues Pertaining to Assignment of Error

Does a trial court exceed its authority if it imposes restitution for a charge dismissed pursuant to a plea bargain when the defendant did not explicitly agree to pay restitution on that dismissed offense?

STATEMENT OF THE CASE

By information filed October 9, 2013, the Jefferson County Prosecutor charged the defendant Uriel L. Garcia with one count of controlled substance homicide, alleging as follows:

COUNT 1: Controlled Substances Homicide - RCW 69.50.415:

On or about February 9-10, 2008, in the County of Jefferson, State of Washington, the above-name Defendant, did knowingly and unlawfully deliver a controlled substance in violation of RCW 69.50.401(2)(a), (b) or (c), to-wit: **Oxycodone** and **Cocaine**, and said controlled substance was subsequently used by the person to whom it was delivered, to-wit: **Brian L. Froslic**, resulting in the death of said person; contrary to Revised Code of Washington 69.50.415.

CP 2 (emphasis and capitalization in original).

On December 23, 2013, Deputy Prosecuting Attorney Chris Ashcraft sent the following written plea offer to the defendant's attorney:

In consideration for your client pleading guilty to delivery of a controlled substance the State will make the following agree recommendation:

- 20 months in custody (top of the range with offender score of 1);
- 12 months community custody; and
- Legal financial obligations that include any restitution.

Please convey this offer to your client as soon as possible. If you have any questions regarding this offer please contact me. Any modifications to this offer must be made in writing and this offer may be revoked at anytime. To accept this offer your client must plead guilty; this offer cannot be accepted through an Alford Plea.

This offer automatically expires **JANUARY 10, 2014**.

CP 123 (emphasis and capitalization in original).

On January 17, 2014, seven days after the written offer automatically expired, the parties appeared before the court. CP 137. At that time the defendant's attorney informed the court that the parties had come to an agreed resolution of the case. *Id.* The court then put the matter over one week for a change of plea. *Id.*

On January 24, 2014, the parties again appeared before the court, at which time the prosecutor filed an amended information charging the defendant with delivery of cocaine. CP 15-16. That information did not name the person or persons to whom the defendant allegedly delivered the controlled substance. *Id.* Rather, it simply alleged the following:

COUNT 1: Delivery of a Controlled Substance - Cocaine - RCW 69.50.401(2)(b): On or about the 9-10th days of February, 2008, in the County of Jefferson, State of Washington, the above-named Defendant did knowingly deliver a controlled substance, to-wit: **Cocaine**; contrary to Revised Code of Washington 69.50.401(2)(b).

CP 15-16 (emphasis in original).

The defendant acknowledged receipt of this information and then handed the court a written Statement of Defendant's on Plea of Guilty. CP 17-25. That guilty plea did not have a written state's plea offer attached to it. *Id.* Rather, paragraph (g) of the form stated as follows:

(g) The prosecuting attorney will make the following recommendation to the judge: DOSA (prison based) 12 + months in custody, community custody LFO's of \$2,575 total, Restitution TBD.

CP 20 (underlining in original, underlined text handwritten).

Nothing within the plea form indicated that the defendant had to agree to this recommendation. CP 17-25. The statement of defendant on plea of guilty did include the following factual statement of the defendant concerning what he did to make him guilty of the amended charge:

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: On or about February 10th, 2008, in Jefferson County, WA, I unlawfully delivered a controlled substance to with: cocaine, in violation of the uniform controlled substances act.

CP 24 (underlining in original, underlined text handwritten).

Following receipt of the guilty plea form the court engaged the defendant in an oral colloquy, during which the court informed the defendant of the standard range for the offense and other consequence for entering the plea. RP 3-8¹. At that end of that colloquy the court read the defendant the handwritten portion of paragraph 11 of the Statement of Defendant on Plea of Guilty and the defendant affirmed that it set out what he had done. RP 7-8. The court then accepted the defendant's guilty plea, found him guilty of delivery of cocaine, and set over sentencing. RP 8-9. At no point during the guilty plea hearing did the prosecutor claim that the defendant was agreeing

¹The record on appeal includes two volumes of verbatim reports. The first includes the hearings on 1/24/14, 1/31/14 and 11/7/14. It is referred to herein as "RP [page #]." The second contains the hearing on 10/3/14 and is referred to herein as "RP 10/3/14 [page#]."

to pay restitution on the original offense. RP 3-8. Neither did the defendant or the defendant's attorney so state. *Id.* In fact, the word "restitution" was not said once during the guilty plea hearing. *Id.*

On January 31, 2014, the parties appeared for sentencing. RP 12-31. At the beginning of the hearing the defendant's attorney stated the following concerning the underlying facts and how the case went from a controlled substance homicide to a delivery of a controlled substance:

MR. CHARLTON: Mr. Garcia pled guilty last week to an amended charge, Unlawful Delivery of Cocaine.

COURT: Uh huh.

MR. CHARLTON: For an incident that occurred in February 2008. It was originally charged as Controlled Substance: Homicide, based on the allegation that, um, he had delivered cocaine and, and Oxycodone to one Brian Froslic, who, uh, died.

COURT: Uh huh.

MR. CHARLTON: The autopsy indicated that Brian Froslic died of acute intoxication from Oxycodone and alcohol, and it was noted that he had had an enlarged heart. We reached a plea agreement, as I said, which Mr. Garcia is pleading, or pled guilty last week to, jh, unlawful delivery of cocaine on that date.

RP 12.

The prosecuting attorney did not dispute the defense attorney's claim.

RP 12-13. Rather, when the court informed the parties that it had received a letter from a person interested in sentencing, the prosecutor explained the following to the court about :

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MR. ASHCRAFT: Everybody has one in their hand. And then because of the way, the way this case was worded. Well, it's a delivery case and typically there's no[] victims in that sort of a case. Because of the underlying facts there are family members that do want to address the COURT, but we do have an agreed recommendation that we're making in this case.

RP 13.

At this point both parties presented an agreed recommendation for a prison-based DOSA sentence. RP 13-15. The court then allowed the decedent's family members to address the court concerning their claims that the defendant had seen their family member dying from the ingestion of drugs and alcohol and that instead of rendering aid he had stolen property from the decedent's home. RP 15-26. The court then followed the joint recommendation of the parties. RP 29-32; CP 32-39. Just prior to signing the judgment and sentence the court asked the prosecutor about restitution. RP 31. This colloquy went as follows:

COURT: Okay. So twelve months and one day to be served with the Department of Corrections. Community custody as required under the DOSA statute, legal financial obligations of \$2,575, and it indicates here restitution. Is there going to be a restitution date?

MR. ASHCRAFT: It was – thank you. July 18th.

COURT: All right.

MR. ASHCRAFT: If there's any. I don't know that there is. We'll have to look into that.

COURT: All right. It'll just be a restitution signed set to determine whether or not restitution will be forthcoming.

MR. ASHCRAFT: Correct.

RP 31.

At this point the court signed the judgment and sentence. RP 32. This was all that was said concerning restitution at the sentencing hearing. RP 11-33.

On June 25, 2014, almost six months after the sentencing hearing, the prosecutor filed a “Declaration re: Restitution,” which consisted of a one page claim from Karen Moegling that she had suffered a loss of \$13,144.25 “as a result of the above-named Defendant’s criminal activity.” CP 44-113. The document had 68 pages of receipts attached. *Id.* It did not claim that the defendant had agreed to pay restitution. *Id.* On September 17, 2014, the defense responded to this declaration by filing a “Restitution Brief.” CP 117-119. In that Restitution Brief the defendant’s attorney stated that “[t]he plea agreement did not include an agreement to pay restitution for a homicide, nor did the statement on plea of guilty acknowledge delivery of cocaine to a particular person.” CP 117. The defense brief then went on to note as follows concerning the cause of Mr. Froslic’s death:

The cause of death was determined through autopsy “to be acute alcohol and oxycodone intoxication with a significant contributing factor being dilated cardiomyopathy (enlarged heart).” See Declaration of Probable Cause, 10/3/13. No cocaine was detected in the toxicology tests “ . . . which could be the result of that the deceased did not ingest any cocaine, or the cocaine in his system metabolized prior to the taking of the sample . . .” *Id.*

CP 117-118.

The only responsive pleading the state filed on the issue of restitution was a copy of the original plea offer made on December 23, 2013, which by its own terms had “automatically expire[d] **JANUARY 10, 2014.**” CP 123 (emphasis and capitalization in original). The prosecutor did not file an affirmation or affidavit claiming that the defendant’s plea on January 17, 2014, had been contingent upon his agreement to pay restitution on the original charge. CP 1-134.

Although the prosecutor did not file any type of affirmation under oath claiming that the defendant had agreed to pay restitution on the original charge, he did so argue before the court at a hearing on October 3, 2014. RP 10/3/14 5-7. Specifically, the prosecutor argued that the term “restitution” as used in the plea offer and as contained in the statement of defendant on plea of guilty meant “restitution on the original charge of controlled substance homicide.” RP 10/3/14 5-9. The court agreed and ordered \$13,144.25 in restitution. RP 10/3/14 9-11; CP 129-130. The defendant thereafter filed timely notice of appeal. CP 132-134.

ARGUMENT

UNDER RCW 9.94A.753 THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED RESTITUTION FOR A CHARGE DISMISSED PURSUANT TO A PLEA BARGAIN BECAUSE THE DEFENDANT DID NOT EXPLICITLY AGREE TO PAY RESTITUTION FOR THAT OFFENSE.

Under the Washington Constitution courts do not have the inherent power to impose restitution in criminal cases. *State v. Tracy*, 73 Wn.App. 386, 869 P.2d 425 (1994). Rather, a court's authority to impose restitution is derived solely from statute. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). In Washington the legislature has granted this authority under RCW 9.94A.753, which allows a court to impose restitution under two circumstances: (1) "whenever the offender is convicted of an offense which results in . . . damage to or loss of property" and (2) "if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement." RCW 9.94A.753(5). Thus, the imposition of restitution "is allowed only for losses that are 'causally connected' to the crimes charged," unless there is an explicit agreement otherwise. *State v. Tobin*, 161 Wn.2d at 524. The phrase "causally connected" creates a "but for" standard requiring only that the state prove that "but for" the defendant's criminal acts, the damages would not have occurred. *State v. Tobin*, 161 Wn.2d at 524, 527;

State v. Landrum, 66 Wn.App. 791, 799, 832 P.2d 1359 (1992) (interpreting a similar restitution statute).

A trial court's decision to impose restitution is reviewed under an abuse of discretion standard. *State v. Tobin*, 161 Wn.2d at 523. A court abuses its discretion when the restitution decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 974 P.2d 828 (1999). Application of an incorrect legal analysis or other error of law may constitute abuse of discretion. *State v. Tobin*, 161 Wn.2d at 523.

In the case at bar the trial court erred when it imposed restitution because (1) there was no causal relation between the offense the defendant committed and the damages related to Brian Froslic's death, and (2) the defendant did not explicitly agree to pay the restitution associated with the dismissed charged. The following sets out these arguments.

1. There Was No Causal Relationship Between the Offense of Delivery of Cocaine and the Damages Related to Brian Froslic's Death.

In the case at bar the only evidence concerning how the decedent died came from the Defendant's restitution brief, wherein he stated:

The cause of death was determined through autopsy "to be acute alcohol and oxycodone intoxication with a significant contributing factor being dilated cardiomyopathy (enlarged heart)." See Declaration of Probable Cause, 10/3/13. No cocaine was detected in the toxicology tests " . . . which could be the result of that the

deceased did not ingest any cocaine, or the cocaine in his system metabolized prior to the taking of the sample . . .” *Id.*

CP 117-118.

The prosecutor did not dispute this claim. Thus, even had the state alleged in the amended information and the defendant admitted in his guilty plea that he had delivered cocaine to the decedent, the delivery of that cocaine had nothing to do with the death of the decedent, who had no cocaine in his system at the time of death. Thus, there was no causal connection between the defendant’s delivery of cocaine to “someone,” and the death of Brian Froslic, which was caused by “acute alcohol and oxycodone intoxication” with “dilated cardiomyopathy” as a contributing factor. As a result, the trial court erred to the extent that it ordered restitution based upon any finding of a causal connection between the defendant’s crime and the death of Brian Froslic.

2. There Was No Evidence in the Record to Support a Finding That the Defendant Explicitly Agreed to Pay the Damages Related to Brian Froslic’s Death.

Under the second sentence in RCW 9A.753(5), a trial court may impose restitution related to counts that are reduced or dismissed if the defendant agrees to that restitution as part of a plea bargain. The second half of subsection 5 of that statute states:

In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer

offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

RCW 9.94A.753(5) (in part).

Our courts have interpreted this and predecessor statutes using the same language to require the existence of an "express agreement" to pay restitution related to uncharged or reduced offenses before the trial court has authority to order a defendant to pay restitution for a loss beyond the scope of the crime charged. *See State v. Elts*, 94 Wn.2d 489, 617 P.2d 993 (1980); *State v. Woods*, 90 Wn.App. 904, 953 P.2d 834 (1998). Although these cases do not define the term "express agreement," Black's Law dictionary provides the following definitions for these words:

Express. Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference Manifested by direct and appropriate language as distinguished from that which is inferred from conduct The word is usually contrasted with "implied."

Black's Law Dictionary, 521 (5th Edition, 1979).

Agreement. A coming together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition. In law, a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances. The consent of two or more person concurring respecting the transmission of some property, right or benefits, with the view of contracting an obligation, a mutual obligation.

Black's Law Dictionary, 62 (first paragraph) (5th Edition, 1979).

Of these two definitions, the former is the most telling in this case. There was nothing in the expired written plea offer, the statement of defendant on plea of guilty, or the guilty plea colloquy that clearly or definitely or explicitly or plainly or directly or unmistakably or unambiguously stated that the defendant had agreed to pay restitution for the dismissed offense. Indeed, the only mention of the word “restitution” was in the written plea form itself and then only as that term is used with almost every single guilty plea entered in our courts. It was anything but explicit. In fact, a colloquy between the court and the prosecutor at the end of the sentencing hearing reveals that neither the court nor the prosecutor at that point even contemplated an argument that the defendant had agreed to pay restitution arising from the dismissed controlled substance homicide charge. This colloquy went as follows:

COURT: Okay. So twelve months and one day to be served with the Department of Corrections. Community custody as required under the DOSA statute, legal financial obligations of \$2,575, and it indicates here restitution. Is there going to be a restitution date?

MR. ASHCRAFT: It was – thank you. July 18th.

COURT: All right.

MR. ASHCRAFT: If there's any. I don't know that there is. We'll have to look into that.

COURT: All right. It'll just be a restitution signed set to determine whether or not restitution will be forthcoming.

MR. ASHCRAFT: Correct.

RP 31.

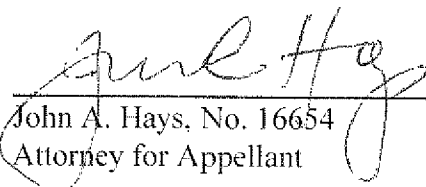
The prosecutor's statement at the end of sentencing hearing that he didn't "know that there [was]" any restitution and that he would "have to look into that" reveals there that was not even an implied agreement much less an express agreement to pay restitution for the dismissed controlled substance homicide. Thus, in the case at bar, the trial court erred when it found that the defendant had expressly agreed to pay restitution associated with the dismissed controlled substance homicide charge. As a result, this court should vacate the order of restitution.

CONCLUSION

The trial court exceeded its authority when it imposed restitution on the dismissed offense. As a result, this court should vacate the order of restitution and remand with instructions to reset the amount of restitution to \$0.00.

DATED this 20th day of May, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9.94A.753

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction

until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is in confinement in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period. The department is responsible for supervision of the offender only during confinement and authorized supervision and not during any subsequent period in which the offender remains under the court's jurisdiction. The county clerk is authorized to collect unpaid restitution at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations.

(5) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

(6) Restitution for the crime of rape of a child in the first, second, or third degree, in which the victim becomes pregnant, shall include: (a) All of the victim's medical expenses that are associated with the rape and resulting pregnancy; and (b) child support for any child born as a result of the rape if child support is ordered pursuant to a civil superior court or administrative order for support for that child. The clerk must forward any restitution payments made on behalf of the victim's child to the Washington state child support registry under chapter 26.23 RCW. Identifying information about the victim and child shall not be included in the order. The offender shall receive a credit against any obligation owing under the administrative or superior

court order for support of the victim's child. For the purposes of this subsection, the offender shall remain under the court's jurisdiction until the offender has satisfied support obligations under the superior court or administrative order for the period provided in RCW 4.16.020 or a maximum term of twenty-five years following the offender's release from total confinement or twenty-five years subsequent to the entry of the judgment and sentence, whichever period is longer. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The department shall supervise the offender's compliance with the restitution ordered under this subsection.

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

(8) In addition to any sentence that may be imposed, an offender who has been found guilty of an offense involving fraud or other deceptive practice or an organization which has been found guilty of any such offense may be ordered by the sentencing court to give notice of the conviction to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense by mail, by advertising in designated areas or through designated media, or by other appropriate means.

(9) This section does not limit civil remedies or defenses available to the victim, survivors of the victim, or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim. The court shall identify in the judgment and sentence the victim or victims entitled to restitution and what amount is due each victim. The state or victim may enforce the court-ordered restitution in the same manner as a judgment in a civil action. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

URIEL L. GARCIA,
Appellant.


NO. 46926-0-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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2. Uriel L. Garcia,
1521 S. 152nd Place, No. 29
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Dated this 26th day of May, 2015, at Longview, WA.


Diane C. Hays

HAYS LAW OFFICE

May 27, 2015 - 9:45 AM

Transmittal Letter

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Petition for Review (PRV)

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